IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1296

H. STUART CUNNINGHAM, CLERK, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

vs.

CHICAGO COUNCIL OF LAWYERS, AN ASSOCIATION OF LAWYERS, EDGAR BERNHARD, ELMER GERTZ, CECIL C. BUTLER, WILLARD J. LASSERS, ROBERT PLOTKIN, JOHN H. SCHLEGEL, JOEL J. SPRAYREGEN, SAMUEL K. SKINNER, UNITED STATES ATTORNEY, JOHN J. TWOMEY, UNITED STATES MARSHAL, AND TERENCE F. MAC CARTHY, ROBERT S. BAILEY, WILLIAM A. BARNETT, CHARLES A. BELLOWS, EDWARD J. CALIHAN, JR., GEORGE F. CALLAGHAN, GEORGE J. COTSIRILOS, THOMAS D. DECKER, ANTONIO M. GASSAWAY AND CORNELIUS E. TOOLE, GENERAL COUNSEL, LEGAL OFFICE, CHICAGO METROPOLITAN COUNCIL NAACP,

Respondents.

PETITIONER'S REPLY TO THE BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

HENRY L. PITTS,
208 South LaSalle Street,
Chicago, Illinois 60604,
(312) 372-5600,
Attorney for Petitioner.

Of Counsel:
W. GERALD THURSBY.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1296.

H. STUART CUNNINGHAM, CLERK, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

vs.

CHICAGO COUNCIL OF LAWYERS, AN ASSOCIATION OF LAWYERS, EDGAR BERNHARD, ELMER GERTZ, CECIL C. BUTLER, WILLARD J. LASSERS, ROBERT PLOTKIN, JOHN H. SCHLEGEL, JOEL J. SPRAYREGEN, SAMUEL K. SKINNER, UNITED STATES ATTORNEY, JOHN J. TWOMEY, UNTED STATES MARSHAL, AND TERENCE F. MAC CARTHY, ROBERT S. BAILEY, WILLIAM A. BARNETT, CHARLES A. BELLOWS, EDWARD J. CALIHAN, JR., GEORGE F. CALLAGHAN, GEORGE J. COTSIRILOS, THOMAS D. DECKER, ANTONIO M. GASSAWAY AND CORNELIUS E. TOOLE, GENERAL COUNSEL, LEGAL OFFICE, CHICAGO METROPOLITAN COUNCIL NAACP,

Respondents.

PETITIONER'S REPLY TO THE BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The Brief in Opposition to the Petition for Certiorari makes two suggestions in support of the position that this Court should not review the decision of the Court of Appeals invalidating the

court rules drafted and adopted upon the recommendation of the Judicial Conference of the United States: first, it would be inappropriate for the Court to review that decision because the issues presented are "not ripe enough" to justify the Court's exercising its discretion pursuant to Rule 19; second, the review of the rules promulgated by the judicial branch of the government has not been initiated by the Solicitor General, an officer in the executive branch of the government.

The Brief in Opposition, by employing a studied obfuscation, could create misunderstanding concerning the factual background of this litigation and the parties who participated in it. At the outset it should be noted that the Brief was filed only on behalf of the Chicago Council of Lawyers, an organization of several hundred members of the Chicago bar and seven individual lawyers associated with that organization. These respondents were the plaintiffs who filed a complaint in two counts on behalf of themselves individually and as representatives of a class consisting of all lawyers practicing before the District Court, asking for injunctive relief and a declaratory judgment that the District Court's rules in question, including Disciplinary Rule 7-107 of the American Bar Association's Code of Professional Responsibility incorporated in the rules, are facially unconstitutional as violative of the plaintiffs' First Amendment rights. The plaintiffs alleged that they brought the action "to vindicate their rights, as lawyers," to comment publicly about pending cases in which they might then or thereafter be engaged unless it is first proved that their comments "create a clear and present danger of a serious and imminent threat to the administration of justice." The three named defendants were the United States Attorney for the Northern District of Illinois, the Marshal for the District (both being officials in the executive branch of the government), and the Clerk of the District Court, all of whom were alleged to participate in the enforcement of the rules. The additional ten named respondents are attorneys who were granted leave to intervene when they alleged that they

are attorneys regularly engaged in the representation of defendants in criminal cases in the Northern District of Illinois. In seeking leave to intervene, those ten respondents averred that they fully supported the rules, and further averred that the individual plaintiffs "are not themselves members of the subclass made up of attorneys who regularly represent defendants in criminal cases in this Court, a subclass which they purport to represent." (Motion to Declare Interveners the Proper Representatives of Attorneys Who Regularly Represent Defendants in Criminal Cases in this Court, paragraph 6)[1] Both the three named defendants and the ten interveners moved to dismiss the action. After extensive briefing and argument, in which the American Bar Association participated as amicus curiae in support of the rules, the District Court's Executive Committee granted the motions to dismiss, thereby making it unnecessary to determine whether the plaintiffs or the interveners were the proper representatives of the alleged class.

The Brief in Opposition (hereinafter "Council's Brief") also seeks to leave the impression that the rules are nothing more than a number of loosely-drafted and ill-advised local court rules and makes no attempt to respond to the petitioner's emphasis upon the origin and quasi-legislative nature of the rules. The Council's Brief completely ignores the extraordinarily intensive consideration given to the rules by the bench and bar throughout the country prior to their adoption and fails to recognize the fact that the rules are the work of the Judicial Conference of the United States, which was exercising the inherent supervisory power of the judicial branch of government pursuant to this Court's directions in *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966).

1. Interveners also alleged on information and belief that none of the individual plaintiffs "are presently engaged in or within the last few years have represented defendants charged with crimes in [the local district court]"; they went on to allege that the individual plaintiffs therefore "cannot and do not fairly and adequately represent, nor as apparent in a reading of their complaint, will they adequately protect the interests of the subclass—*i.e.*, attorneys who regularly represent defendants in criminal cases."

The Council's "Ripeness" Argument.

The Council's Brief suggests that "[f]or three reasons the issues sought to be raised by petitioner are not sufficiently ripe for proper review by this Court." (Council's Br., p. 3) The first of these reasons appears to be that because the Court of Appeals "upheld the rules in a number of respects" and because the District Court "presumably will establish new rules" under the "clear guidelines" set out by the Court of Appeals, this Court should not review the rules.

The assertion that the court below "upheld the rules in a number of respects" is, of course, completely false. The Court of Appeals quite clearly held that all the rules are unconstitutional on their face because they do not employ the "serious and imminent threat" standard.

And what are the "clear guidelines to be employed . . . in rewriting the rules"? The Council's Brief never identifies any of those guidelines. Indeed, in criticizing the rules relating to civil trials the respondents argue that those trials should be dealt with "on a case-by-case basis." In other words, there should be no rules at all. Moreover, it is less than candid to say that the civil rules struck down "prohibited speech without any stated requirement that such speech affect the administration of justice." (Council's Br., p. 9) As the District Court observed in its opinion, the "reasonable likelihood" standard "was clearly the underlying theory upon which the A. B. A. Disciplinary Rules were promulgated." 371 F. Supp. at 691, fn. 2. The Council must know that the Judicial Conference rule concerning civil cases adopted by the District Court as Rule 40 (Petition, p. 9) expressly incorporates the "reasonable likelihood" standard.

The Petition does not "mischaracterize" the decision below in this respect as the Council's Brief suggests. Petitioner reiterates that the holding of the Seventh Circuit, if permitted to stand, would effectively frustrate efforts of the judiciary to prevent prejudice to litigants in civil cases arising out of extrajudicial

statements by the lawyers during trial. The Council's Brief offers no suggestion as to any basis upon which rules regarding civil litigation could be sustained, if the decision in this case is not reversed. Indeed, the Council has virtually conceded this point, notwithstanding their complaints about mischaracterizing the decision, by their saying that the threats to fair trials in civil litigation should be dealt with on a case-by-case basis. If there are to be any meaningful or reasonably effective rules for the benefit of both the trial bench and the bar, the Council nowhere offers us any clue as to what they may be—and for good reason.

The Council insists that lawyers have a constitutionally protected right to make public statements regarding their cases during trial, because discussion of the issues is likely to attract more attention during the pendency of a case. In support of this position they quote from Mr. Justice Black's majority opinion in *Bridges* v. *California,* 314 U. S. 252 (1941) However, *Bridges* is inapposite because it dealt with statements made by Mr. Bridges and by the press and not with public comments of a lawyer while engaged in the trial of a case. Moreover, the quotation is taken out of context. There is no suggestion from Mr. Justice Black's comments that he was treating with public comments that could affect the outcome of the trial in question. In fact, he followed the statements quoted at page 9 of the Council's Brief by observing "[t]he very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." 314 U. S. at 271.

The second reason stated in support of the suggestion that this case is not "ripe for review" is that the case "does not present the actual application of restraints to any specific exercise of free speech by respondents." While this is correct, it must also follow that the very same dispute could not have been any less abstract at the time it was considered by the Court of Appeals. Attempting to evade the inevitable effect of their argument, the Council contends that the mere existence of the rules

created a "chilling effect" on the exercise of First Amendment freedoms and created a live controversy justifying a judicial determination of their rights. But this would set up an unequal and untenable dichotomy whereby court rules may be challenged on constitutional grounds at any time in the lower courts, with the privilege of Supreme Court review available exclusively to the challengers.

It is interesting to compare this argument with the position taken by the Council in the court below. When the petitioner first raised these jurisdictional matters in his Petition for Rehearing En Banc filed with the Court of Appeals (which four of the seven judges who considered the matter thought should be granted), the Council vigorously denied that any crucial jurisdictional issues had been overlooked. In their Brief in response to the Petition for Rehearing they said that the suggested jurisdictional issues were "non-existent" and went on to assert: "As for the implication that the issues are somehow not real because 'not addressed to specific, concrete facts,' it is wholly without merit."

The Council cannot have it both ways. If there is merit to its contention that this appeal fails to present a justiciable controversy, it follows that the opinion below must be reversed on jurisdictional grounds. And if the complaint did in fact raise a claim cognizable by the courts below, then the Court should grant certiorari and consider this appeal on the merits.

The third reason advanced in the Council's Brief in support of the suggestion that this case is not ripe for decision by this Court is that the Tenth Circuit decision in *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir. 1969), *cert. denied*, 396 U. S. 990 (1969), is not in conflict with the position of the Seventh Circuit regarding the issues in this proceeding. Even a cursory review of the decisions in the two circuits demonstates beyond doubt that the argument is fallacious.

In mid-1969 the Tenth Circuit in *Tijerina* rejected attacks on the constitutionality of a trial court's order that forbade the

attorneys and other participants in a pending case to "make or issue any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court." 412 F. 2d at 663. The court said that such extrajudicial statements would create a reasonable likelihood of prejudicing a fair trial. As discussed at page 24 of the Petition, the Tenth Circuit squarely held that the "reasonable likelihood" standard was valid.

A few months later the Seventh Circuit in *Chase* v. *Robson*, 435 F. 2d 1059 (7th Cir. 1970), reviewed an order entered by the district court on the eve of a trial, which ordered counsel for the government, as well as the defendants, to "make or issue no statements, written or oral, either at a public meeting or occasion, or for public reporting or dissemination in any fashion, regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses, or the rulings of the court." 435 F. 2d at 1060. The trial court's order incorporated the reasonable likelihood standard. Within a matter of hours a Seventh Circuit Court of Appeals panel issued a writ of mandamus directing the trial court to vacate its order. As pointed out at page 25 of the Petition, the *Chase* court referred to *Tijerina* but misstated the *Tijerina* holding and went on to rule that the proper constitutional standard is "a serious and imminent threat to the administration of justice." If there was any doubt about the view of the Seventh Circuit, it definitely was dispelled by the decision in the instant case, which unequivocally rejected the "reasonable likelihood" standard as unconstitutional. This time, however, the Seventh Circuit court chose to ignore *Tijerina* and cited only its own decisions in *Chase* and *In re Oliver*, 452 F. 2d 111 (7th Cir. 1970).

The argument of the Council, therefore, that *Tijerina* is distinguishable because it involved a specific order in a pending

criminal case is without merit. The specific order in *Chase* was virtually identical to the order in *Tijerina*, but the Tenth Circuit held that the order met constitutional requirements, and the Seventh Circuit decisions make it abundantly clear that such orders do not incorporate the proper constitutional standard.

Review of the Judiciary's Court Rules Should Not Depend Upon the Solicitor General's Action or Inaction.

The rules were drafted and promulgated by the federal judiciary to protect the integrity of the judicial function by providing guidelines for the trial courts and the lawyers who are officers of those courts. Contrary to the impression which the Council apparently would like to create, the United States Attorney for the Northern District of Illinois, serving as counsel for the three defendants throughout the years this case was under consideration in the courts below, faithfully supported the rules, even though he was in a somewhat awkward position because the rules proscribed extrajudicial comments of government and non-government lawyers alike. Further, as noted earlier, the Solicitor General, as well as the United States Attorney and the Marshal, are officers of the executive branch of the federal government. While the latter two were defendants in this case, they had no role in the formulation of the existing rules, and they clearly have no authority to promulgate new court rules. For this reason alone, the Solicitor General could well have determined that it would be inappropriate for him to initiate any review of the decision below.

In any event, the petitioner here, who is an officer in the judicial branch of the federal government, and the District Court whose rules have been struck down, determined to retain independent counsel who could without question represent the judiciary's interests in the rules with undivided loyalty. The Council's suggestion that the Court should not review the rules unless the executive branch chooses to initiate such review would leave the federal courts without any means to carry out one of their principal supervisory powers.

CONCLUSION.

If there were any reservations about the imperative nature of the need for this Court to offer some guidance and clarification for the federal bench and bar in this vitally important area, those reservations surely have been laid at rest by the contentions made in the Council's Brief in Opposition to the Petition.

They certainly considered the constitutional issues important enough to file suit challenging the District Court rules in their entirety, before any litigation had been filed involving the application of any one of the rules. Having obtained a declaration in their behalf of the invalidity of all of the rules as formulated by the Judicial Conference and adopted by the local district court, they would now like to end the controversy which they initiated. Suddenly, for the first time, they now insist that the rules (whatever they may be after being mutilated by the decision below) should not be reviewed by the Court because "the posture of this case makes it singularly inappropriate for this Court's review because it does not present the actual application of restraints to any specific exercise of free speech by respondents." (Council's Br., p. 4) If this litigation presented a justiciable controversy when the plaintiffs filed their complaint, the controversy is just as real and in need of resolution today as it was then.

These very same rules, which were struck down by the reviewing court below, have been adopted in nearly all of the district courts throughout the country. Must all these district courts and the Judicial Conference go "back to the drawing board"—as the Council's Brief demands? And, if they must, how are they to recast their rules, especially as they pertain to federal civil trials? It would be an invitation to chaos for this Court to stay its hand, for if there are to be any authoritative court rules relating to this crucially important subject, now is the time to settle the questions raised by the Seventh Circuit decision. One of the purposes of the arduous study undertaken by the Judicial

Conference was to achieve a set of narrowly-drawn, uniform rules for the guidance of all federal district courts. This objective will not be achieved if the case-by-case approach suggested by the Council's Brief is followed. All of those rules will be in limbo and subject to challenge so long as this decision is permitted to stand. The concerns which the Council has recently discovered about whether the Seventh Circuit has rendered an advisory opinion are so disingenuous as to be unworthy of further consideration. Petitioner respectfully submits that the advancement of this argument is a compelling reason by itself for this Court to review the matter on the merits.

Respectfully submitted,

HENRY L. PITTS,
208 South LaSalle Street,
Chicago, Illinois 60604,
(312) 372-5600,
Attorney for Petitioner.

Of Counsel:
W. GERALD THURSBY.

April, 1976.